Mohd Faizal bin Musa v Minister of Home Affairs

HIGH COURT (KUALA LUMPUR) — APPLICATION FOR JUDICIAL REVIEW NO 25–196–06 OF 2015
HANIPAH FARIKULLAH J
21 NOVEMBER 2016

Administrative Law — Judicial review — Application for — Applicant applied for judicial review against respondent's order under s 7(1) of the Printing Presses and Publications Act 1984 — Whether there must be first actual occurrence of public disorder before respondent could make order — Whether Minister taken into account irrelevant consideration — Whether applicant given reasonable opportunity to be heard — Whether respondent's conduct inconsistent with art 8(1) of the Federal Constitution — Federal Constitution arts 8(1) & 10(2)(a) — Printing Presses and Publications Act 1984 s 7(1)

The Minister of Home Affairs ('the respondent') had issued an order ('the order') pursuant to s 7(1) of the Printing Presses and Publications Act 1984 ('the Act'), prohibiting the printing, importation, production, reproduction, publishing, sale, issue, circulation, distribution or possession of books entitled 'Sebongkah Batu di Kuala Berang', 'Karbala', 'Tiga Kali Seminggu' and 'Ingin Jadi Nasrallah' ('the books') which were written by the applicant. Prior to the making of the order, the respondent had called the applicant for a meeting together with Jabatan Kemajuan Islam Malaysia ('JAKIM') to have discussion pertaining to the books which had been certified by JAKIM to be prohibited. Nevertheless, the applicant informed the respondent that he would not attend to the said meeting as the proposed meeting did not have any basis and was not necessary. The present application for judicial review was filed by the applicant to challenge the legality and propriety of the order. The applicant submitted that: (a) there must be first an actual occurrence of public disorder before the respondent could make the order; (b) the Minister had taken into account irrelevant consideration when he relied on the decision of the Jawatankuasa Fatwa; (c) he was not given reasonable opportunity to provide to the respondent the explanation that he had given in the present judicial review proceeding; and (d) the respondent's conduct in prohibiting the books but not the prior publications by *Dewan Bahasa dan Pustaka* and *Mingguan Malaysia* was discriminatory and therefore inconsistent with the requirements under art 8(1) of the Federal Constitution ('the Constitution') and that the respondent must act with fairness and equality of treatment.

Held, dismissing the applicant's application with costs of RM5,000:

(1) It must be emphasised that the issue of whether there must first be an actual occurrence of public disorder before the respondent could make the impugned order ought not to be made the true and correct test in determining the legality of the order. The phrase 'prejudicial to public order' does not necessarily refer to the existence of an actual public disorder, but include anything which has the 'potential' to disrupt public order (see paras 25–26).

(2) The content of the publication related to 'Islamic law matter' and therefore it would be reasonable for the Minister to place reliance on the decision of the Jawatankuasa Fatwa besides his own appreciation of the contents of the publication. In order to prevent the publications from creating uneasiness, confusion, triggering restlessness among the Muslims and causing disintegration, it was lawful for the respondent to act in the way he did to ban the book under s 7(1) of the Act on the ground that the book was likely to be prejudicial to public order. In the present case, the grounds invoked by the Minister were that the books were likely to be prejudicial to public order and security. Therefore, compliance by the Minister with s 7(1) of the Act required that the books were likely be prejudicial to public order and security. Further, the respondent's decision in making the order did not suffer from illegality since the reasoning offered in his affidavit were in fact based on public order grounds (see paras 33–35 & 37).

(3) It was clear that the applicant was given the opportunity to be heard. He was called for a meeting to discuss on the prohibition of the books by JAKIM which he chose not to attend. Therefore, the applicant had no reason to complaint that he was not given the opportunity to be heard (see para 41).

(4) The applicant's right under art 8 of the Constitution was not absolute. Under art 10(2)(a) of the Constitution, Parliament is empowered to restrict these rights through the provisions of the law. The Act is one of the statutory provisions enacted pursuant to the provisions of art 10(2)(a) of the Constitution which aims to limit freedom of expression of individuals on the grounds, inter alia, prejudicial to public order as stated under s 7(1) of the Act. The order was valid under the Act because the subject matter of the order was associated with 'publication' and the order was made in conformity with the object/purpose of the Act (see paras 45–48).

(5) Based on the findings, the respondent had exercised his discretionary powers under s 7(1) of the Act by not taking into account irrelevant considerations and took into account relevant considerations, without improper motives and had directed his mind in deciding to issue the order, and finally the decision was made in accordance with the objective of the statute (see para 49).

[Bahasa Malaysia summary

Menteri Dalam Negeri ('responden') telah mengeluarkan satu perintah (perintah tersebut') berikutan s 7(1) Akta Mesin Cetak dan Penerbitan ('Akta tersebut'), yang melarang percetakan, pengimportan, pengeluaran, pembiakan, penerbitan, penjualan, pengeluaran, peredaran, pengedaran atau pemilikan buku yang bertajuk 'Sebongkah Batu di Kuala Berang', 'Karbala', 'Tiga Kali Seminggu' dan 'Ingin Jadi Nasrallah' ('buku-buku tersebut') yang telah ditulis oleh pemohon. Sebelum membuat perintah tersebut, responden telah memanggil pemohon untuk bersama bermesyuarat dengan Jabatan Kemajuan Islam Malaysia ('JAKIM') bagi membincangkan berkenaan buku-buku tersebut yang telahpun diperakui oleh JAKIM agar dilarang. Walau apa pun, pemohon telah memberitahu responden bahawa dia tidak akan menghadiri mesyuarat tersebut kerana mesyuarat yang dicadangkan tidak mempunyai apa-apa asas dan adalah tidak perlu. Permohonan untuk semakan kehakiman ini telah difailkan oleh pemohon untuk mencabar kesahan dan kesesuaian perintah tersebut. Pemohon berhujah bahawa: (a) mesti ada pertama satu kejadian sebenar gangguan awam sebelum responden boleh membuat perintah tersebut; (b) Menteri telah mengambil kira pertimbangan yang tidak relevan apabila beliau bergantung kepada keputusan Jawatankuasa Fatwa; (c) beliau tidak memberikan peluang munasabah untuk memberikan responden penjelasan sepertimana yang telah diberikan oleh beliau dalam prosiding semakan kehakiman ini; dan (d) perilaku responden yang melarang buku-buku tersebut tetapi bukan penerbitan-penerbitan sebelumnya oleh *Dewan Bahasa dan Pusaka* dan *Mingguan Malaysia* bersifat diskriminasi dan oleh itu tidak konsisten dengan keperluan di bawah perkara 8(1) Perlembagaan Persekutuan ('Perlembagaan tersebut') dan bahawa responden mesti bertindak dengan layanan secara adil dan saksama.

Diputuskan, menolak permohonan pemohon dengan kos RM5,000:

(1) Adalah perlu ditekankan bahawa isu sama ada perlu ada kejadian sebenar gangguan awam sebelum responden boleh membuat perintah yang dipersoalkan tidak patut dibuat dalam ujian sebenar dan betul dalam menentukan kesahan perintah tersebut. Frasa 'prejudicial to public order' tidak semestinya merujuk kepada kewujudan gangguan awam sebenar, tetapi termasuk apa-apa yang mempunyai 'potential' untuk mengganggu ketenteraman awam (lihat perenggan 25–26).

(2) Kandungan penerbitan adalah berkaitan 'Islamic law matter' dan oleh itu ia adalah munasabah untuk Menteri meletakkan kebergantungan kepada keputusan Jawatankuasa Fatwa selain daripada pemahaman beliau sendiri tentang kandungan penerbitan tersebut. Bagi tujuan menghalang penerbitan-penerbitan itu daripada mewujudkan ketidaksenangan, kekeliruan, mencetus kegelisahan di kalangan orang Muslim dan menyebabkan perpecahan, ia adalah sah untuk responden bertindak

dalam cara yang dilakukakannya untuk melarang buku-buku tersebut di bawah s 7(1) Akta terebut atas alasan bahawa buku tersebut berkemungkinan bersifat prejudis kepada ketenteraman awam. Dalam kes ini, alasan-alasan yang digunakan oleh Menteri adalah bahawa buku-buku tersebut berkemungkinan bersifat prejudis kepada ketenteraman dan keselamatan awam. Oleh demikian, pematuhan oleh Menteri dengan s 7(1) Akta tersebut menghendaki agar buku-buku tersebut berkemungkinan bersifat prejudis kepada ketenteraman dan keselamatan awam. Selanjutnya, keputusan responden membuat perintah tersebut tidak menyalahi undang-undang kerana sebab yang diberikan dalam afidavitnya sebenarnya berdasarkan alasan-alasan ketenteraman awam (lihat perenggan 33–35 & 37).

(3) Adalah jelas bahawa pemohon telah diberikan peluang untuk didengar. Dia telah dipanggil untuk satu mesyuarat bagi membincangkan tentang larangan buku-buku tersebut oleh JAKIM yang mana dia memilih untuk tidak menghadiri. Oleh itu, pemohon tiada sebab untuk mengadu bahawa dia tidak diberikan peluang untuk didengar (lihat perenggan 41).

(4) Hak pemohon di bawah perkara 8 Perlembagaan tersebut adalah tidak mutlak. Di bawah perkara 10(2)(a) Perlembagaan tersebut, Parlimen diberi kuasa untuk menghalang hak-hak tersebut melalui peruntukan-peruntukan undang-undang. Akta tersebut adalah salah satu daripada peruntukan statutori yang digubal berikutan peruntukan perkara 10(2)(a) Perlembagaan tersebut yang bertujuan untuk mengehadkan kebebasan bersuara bagi individu atas alasan-alasan, antara lain, yang bersifat prejudis kepada ketenteraman awam sepertimana dinyatakan di bawah s 7(1) Akta tersebut. Perintah tersebut adalah sah di bawah Akta tersebut kerana hal perkara perintah tersebut adalah berkaitan dengan 'publication' dan perintah tersebut telah dibuat dengan pematuhan kepada objek/tujuan Akta tersebut (lihat perenggan 45–48).

(5) Berdasarkan penemuan itu, responden telah menggunakan kuasa budi bicaranya di bawah s 7(1) Akta tersebut dengan tidak mengambil kira pertimbangan yang tidak relevan dan mengambil kira pertimbangan yang relevan, tanpa motif yang tidak wajar dan telah mengarahkan mindanya dalam membuat keputusan untuk mengeluarkan perintah tersebut, dan akhirnya keputusan tersebut telah dibuat menurut tujuan statut (lihat perenggan 49).]

Notes

For cases on application for judicial review, see 1(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 329–407.

Cases referred to

Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1947] 2 All ER 680, CA (refd)

Arumugam a/l Kalimuthu v Menteri Keselamatan Dalam Negeri & Ors [2013] 5 MLJ 174, CA (refd)

Bushell and another v Secretary of State for the Environment [1980] 2 All ER 608, HL (refd)

Darma Suria bin Risman Saleh v Menteri Dalam Negeri, Malaysia & Ors [2010] 3 MLJ 307, FC (refd)

Dato' Seri Syed Hamid bin Syed Jaafar Albar (Menteri Dalam Negeri) v SIS Forum (Malaysia) [2012] 6 MLJ 340, CA (refd)

Dr Amir Hussein bin Baharuddin v Universiti Sains Malaysia [1989] 3 MLJ 298, HC (refd)

Karam Singh v Menteri Hal Ehwal Dalam Negeri (Minister of Home Affairs), Malaysia [1969] 2 MLJ 129, FC (refd)

Kerajaan Malaysia & Ors v Nasharuddin Nasir [2003] MLJU 841; [2004] 1 CLJ 81, FC (refd)

Kumpulan Perangsang Selangor Bhd v Zaid bin Hj Mohd Noh [1997] 1 MLJ 789, SC (refd)

Minister of Labour, Malaysia v Chan Meng Yuen and another appeal [1992] 2 MLJ 337, SC (refd)

Minister of Labour, Malaysia v Lie Seng Fatt [1990] 2 MLJ 9, SC (refd)

PP v Ooi Kee Saik & Ors [1971] 2 MLJ 108 (refd)

SK Kedar v State of West Bengal AIR 1972 SC 1647, SC (refd)

Legislation referred to

Federal Constitution arts 8, 8(1), 10(1)(a), (2)(a)

Printing Presses and Publications Act 1984 ss 2, 7, 7(1)

Printing Presses and Publications (Control of Undesirable Publications) (No 2) Order 2015

Abdullah bin Abdul Rahman (Nur Syakeera bt Ahmad Affendi and Derrick Moh Ka Yew) (Cheang & Ariff) for the applicant.

Shamsul Bol Hassan (Maisarah Juhari with him) (Senior Federal Counsel, Attorney General's Chambers) for the respondent.

Hanipah Farikullah J:

INTRODUCTION

[1] The applicant filed for judicial review to quash the order made by the respondent, the Home Minister ('the Minister') pursuant to s 7(1) of the Printing Presses and Publications Act 1984 ('Act 301') which prohibited four books written by the applicant.

[2] The reliefs sought by the applicant are as follows:

(a) an order of certiorari to quash the Printing Presses and Publications (Control of Undesirable Publications) (No 2) Order 2015 made by the respondent on 12 February 2015 ('the order');

(b) a declaration that the order is null and void and of no effect as it:

(i) is ultra vires s 7 of the Printing Presses and Publications Act 1984 ('Act 301');

(ii) contravenes art 8(1) of the Federal Constitution;

(iii) contravenes art 10(1)(a) of the Federal Constitution; and

(c) general damages.

THE PARTIES

[3] The applicant is an academician at the Universiti Kebangsaan Malaysia ('UKM'). He holds the Doctor of Philosophy (PhD) from UKM where the area of research of his thesis was comparative literature. He also holds the Master of Arts (Literature) from Universiti Sains Malaysia ('USM') and Bachelor of Shariah from Universiti Malaya. His current appointment is as a Research Fellow at the Institut Alam dan Tamadun Melayu at UKM specialising in the areas of comparative literature, creative writing, film and theatre studies and human rights.

[4] The applicant is also an author of academic and creative books and articles, a scriptwriter and a poet. In creative writing and literature, the applicant goes by the pen name 'Faisal Tehrani'. He is widely known by that name both in the academic and literary circles.

[5] The applicant has written:

(a) 16 articles published in academic journals, four of which are ISI/SCORPUS indexed;

(b) three academic papers for conference proceedings;

(c) 35 creative books;

(d) two academic books;

(e) ten chapters in books/articles in anthologies; and

(f) numerous monographs, working papers and articles in non-academic journals and for various seminars.

[6] The applicant has also been involved in technical, research and/or consultancy capacities in the script writing, art directorship and/or directorship of nine films, short films, videos and stage plays.

[7] The applicant in his affidavit averred that he has received 29 awards at the state, national and international levels in the field of literature, the most prestigious being the following:

(a) best author of the Majlis Sastera Asia Tenggara (Mastera) programme awarded by the South East Asia Literature Council in 2005; and

(b) national art award awarded by the government of Malaysia under the Ministry of Culture, Information, Communication and Multimedia in 2006 (at the age of 32 years old).

[8] The respondent is the relevant 'Minister' responsible for Act 301.

THE BACKGROUND FACTS

[9] The relevant background facts are as follows:

(a) the Minister ('the respondent') had issued an order, pursuant to s 7(1) of Act 301, prohibiting the printing, importation, production, reproduction, publishing, sale, issue, circulation, distribution or possession of books entitled 'Sebongkah Batu di Kuala Berang', 'Karbala', 'Tiga Kali Seminggu' and 'Ingin Jadi Nasrallah' ('the four books');

(b) the order was made on 12 February 2015 and *gazetted* on 1 April 2015 vide PU(A) 67/2015;

(c) prior to the making of the order, it is not a disputed fact that the respondent called/invited the applicant for a meeting on 9 December 2013 together with Jabatan Kemajuan Islam Malaysia ('JAKIM') to have a discussion pertaining to the four books which have been certified by JAKIM to be prohibited;

(d) the applicant replied on 4 December 2013 informing that he will not attend the said meeting to discuss the prohibition of the four books as the proposed meeting did not have any basis and was not necessary (see exh A4 of the applicant's affidavit in support);

(e) the four books had been in circulation in the market prior to the prohibition; and

(f) hence, this application by the applicant is to challenge the legality and propriety of the order.

THE APPLICANT'S SUBMISSION

[10] In gist, the applicant challenged the order based on the following grounds:

(a) the order is irrational:

(i) the four books have been circulated in the market between 4–7 years prior to the prohibition without any prejudice to public order and security and in the circumstances are not likely to be prejudicial to public order;

(ii) the order is irrational for being made without taking into account relevant considerations and/or by taking into account irrelevant considerations;

(b) the order is ultra vires:

(i) being in contravention to the right of freedom of expression under art 10(1)(a) of the Federal Constitution as the books are academic and/or literary works intended to promote literature and academic discussion in narratives;

(ii) being in contravention with art 8(1) of the Federal Constitution as the publisher of *Dewan Sastera*, *Dewan Siswa*, *E-Siswa*, *Nur Magazines*, *Utusan Malaysia* and *Utusan Malaysia* newspaper have not been similarly prohibited under s 7(1) of Act 301;

(c) the order is 'tainted with procedural impropriety':

(i) no reasonable opportunity given to the applicant prior to the Minister making the order;

(ii) the invitation to discuss on the publication of the four books by the respondent on 3 December 2013 does not amount to providing the applicant reasonable opportunity to be heard.

THE RESPONDENT'S POSITION

[11] In response, learned senior federal counsel contended for the respondent that as long as the Minister exercises the discretion without improper motive, the exercise of discretion must not be interfered with by the court unless he has misdirected himself in law or had taken into account irrelevant matters or had not taken into consideration relevant matters or that his decision militates against the object of the statute.

[12] In support of his submission, learned senior federal counsel relied on the case of *Minister of Labour, Malaysia v Lie Seng Fatt* [1990] 2 MLJ 9 and

Minister of Labour, Malaysia v Chan Meng Yuen and another appeal [1992] 2 MLJ 337.

[13] It was further submitted for the respondent that the applicant must show that the Minister acted unreasonably within the *Wednesbury* principle.

ISSUES

[14] In considering the application before me, I had to consider whether on the facts before me the body under review had carried out the policy in the manner prescribed by the Constitution and the relevant laws. If it had, I could not interfere with the decision, unless it is illegal, irrational, 'procedural impropriety' and that it was so unreasonable that no reasonable body of person could have reached that decision (see *Dr Amir Hussein bin Baharuddin v Universiti Sains Malaysia* [1989] 3 MLJ 298 followed).

THE LAW

[15] Section 7(1) of Act 301 empowers the Minister to publish an order by way of a *gazette* to prohibit, either absolutely or subject to such conditions as may be prescribed, the printing, importation, production, reproduction publishing, sale, issue, circulation, distribution or possession of that publication and future publications of the publisher concerned, if the Minister is satisfied that the publications mentioned therein are prejudicial to or likely to be prejudicial to public order, morality, security, or which are likely to alarm public opinion, or are likely to be contrary to any law or are otherwise prejudicial to, or are likely to be prejudicial to public interest or national interest.

[16] Section 7(1) of Act 301 provides as follows:

> 7 Undesirable Publications
>
> (1) If the Minister is satisfied that any publication contains any article, caricature, photograph, report, notes, writing, sound, music, statement, or any other thing which is in any manner prejudicial to or likely to be prejudicial to public order, morality, security, or which is likely to alarm public opinion, or is likely to be contrary to any law or is otherwise prejudicial to or is likely to be prejudicial to public interest or national interest, he may in his discretion by order published in the Gazette prohibit, either absolutely or subject to such conditions as may be prescribed, the printing, importation, production, reproduction publishing, sale, issue, circulation, distribution or possession of that publication and future publications of the publisher concerned.

DECISION

Whether the four books are prejudicial to public order or is likely to be prejudicial to public order and security

[17] The affidavit evidence filed by the respondent shows that the Minister's grounds for the order can be seen at para 15(a)–(j) at pp 6–9 of respondent's affidavit in reply dated 17 Deember 2015 which are as follows:

(i) Bahagian Kawalan Penerbitan dan Teks Al Quran telah mengkaji isi kandungannya dan mendapati 4 Buku tersebut mengandungi unsur-unsur yang mengelirukan umat Islam di Negara ini yang dikhuatiri akan menimbulkan ancaman keselamatan serta menggugat ketenteraman awam;

(ii) Saya telah merujuk 4 Buku tersebut untuk mendapatkan pandangan dan nasihat daripada pakar-pakar berkaitan agama Islam daripada Jabatan Kemajuan Islam Malaysia (JAKIM) dan saya telah mempertimbangkan kajian yang dikemukakan oleh JAKIM sebelum membuat keputusan;

(iii) Saya juga merujuk kepada keputusan Muzakarah Khas Jawatankuasa Fatwa Majlis Kebangsaan Bagi Hal Ehwal Agama Islam yang telah bersidang pada 5 Mei 1996 yang telah memutuskan seperti berikut:

(a) Menetapkan bahawa umat Islam di Malaysia hendaklah mengikut ajaran Islam serta adalah tertakluk kepada undang-undang Islam Hukum Syarak yang berasaskan pegangan Ahli Sunnah Wal Jamaah;

(b) Memperakukan bahawa ajaran Islam yang lain daripada Ahli Sunnah Wal Jamaah adalah bercanggah dan penyebaran apa-apa ajaran yang lain adalah dilarang;

(c) Menetapkan bahawa penerbitan, penyiaran dan penyebaran apa-apa buku, risalah, filem, video dan lain-lain berhubung dengan ajaran yang bertentangan dengan Ahli Sunnah Wal Jamaah adalah diharamkan.

(iv) Sebagai contoh antara isi kandungan di dalam 4 Buku tersebut, Pemohon kagum dan berkeinginan menjadi seperti Hassan Nashrullah iaitu pemimpin Hizbullah, gerakan Syiah di Lubnan. Kekaguman terhadap tokoh syiah ini jelas menampakkan kepercayaan Pemohon terhadap Syiah;

(v) Sebagai contoh lain, Pemohon juga memburuk-burukkan khalifah kedua Bani Umaiyyah iaitu Yazid anak Saidini Mu'awiyah bin Abu Sufyan dengan mengatakan Yazid adalah golongan fasik dan menyamakan seperti Zionis dan Hitler. Ungkapan 'kita tidak boleh mengamalkan politik kotor ala Muawiyah dan Yazid' jelas menghina sahabat Rasulullah dan adalah merupakan ungkapan yang sering digunakan oleh penganut Mazhab Syiah;

(vi) Isi kandungan 4 Buku tersebut juga memuatkan ayat provokasi 'wajib kita tebus kembali' untuk membangkitkan rasa marah terhadap Saidina Abu

Bakar RA dan para sahabat beliau (dalam peristiwa rampasan Tanah Fadak) dan provokasi sebegini dikhuatiri akan mewujudkan perbalahan antara golongan Ahli Sunnah Wal Jamaah dan golongan Syiah seperti yang berlaku di Syria sekarang;

(vii) Dalam hal ini, saya telah dinasihatkan oleh pakar-pakar daripada JAKIM dan sesungguhnya percaya bahawa memandangkan Negara ini mengamalkan ajaran Islam berdasarkan ajaran Ahli Sunnah Wal Jamaah dan Syiah ini dikhuatiri boleh mencetuskan ancaman keselamatan di kalangan ummah seperti yang berlaku di sebahagian Negara Arab sekarang;

(viii) Secara keseluruhannya, 4 Buku tersebut banyak mengandungi idea-idea yang mempropagandakan pegangan Syiah dan dikhuatiri akan menimbulkan kemarahan umat Islam di Malaysia. Pemikiran sebegini boleh membawa kepada kecelaruan antara umat Islam dan seterusnya mencetuskan suasana tidak tenteram di kalangan ummah sehingga boleh membawa kepada perpecahan umat Islam yang mana akan memprejudiskan ketenteraman awam sekiranya ia dibiarkan berleluasa;

(ix) Tindakan saya untuk mewartakan dan 4 Buku tersebut sebagai buku yang dilarang pencetakan dan pencetaknya adalah selaras dengan bidang kuasa yang diberikan kepada saya untuk mengelakkan kekeliruan orang awam secara khususnya umat Islam di Negara ini dengan karya-karya yang cenderung ke arah ajaran Syiah yang ditulis oleh Pemohon dalam 4 Buku tersebut.

(x) Oleh itu, suatu keputusan dan tindakan segera harus dilaksanakan bagi menyekat 4 Buku tersebut daripada, antara lainnya, terus dicetak, diterbit dan/atau dipasarkan kepada umum di Negara ini.

[18] It was contended for the applicant that the four books had been in circulation in the market between four and seven years without any evidence that any of them had caused any prejudice to public order and security. As such, learned counsel for the applicant stressed that the four books are not and are unlikely to be prejudicial to public order.

[19] In support of his submission, the applicant relied on the following authorities.

[20] In *Dato' Seri Syed Hamid bin Syed Jaafar Albar (Menteri Dalam Negeri) v SIS Forum (Malaysia)* [2012] 6 MLJ 340, the Home Minister had prohibited, under s 7(1) of Act 301, a book which had been in circulation for two years before its prohibition. The Court of Appeal held as follows:

> If no evidence of actual prejudice to public order was produced, the conclusion must be that no prejudice to public order had occurred. If in the two years that the book was in circulation no prejudice to public order had occurred, it follows that the book was in the first place unlikely to be prejudicial to public order. The appellant

obviously did not rely on that ground. The appellant relied upon the ground that the book was prejudicial to public order. But it also follows that if no prejudice to public order had occurred in the two years, the book could not be prejudicial to public order. The appellant relied on being satisfied that the book was prejudicial to public order. To be satisfied that the book was prejudicial to public order in the face of the fact there was no prejudice to public order in the two years the book was in circulation, is in such outrageous defiance of logic that it falls squarely within the meaning of *Wednesbury* unreasonableness, and of irrationality.

[21] Learned senior federal counsel for the respondent submitted that for the Minister to be satisfied that the four books were prejudicial to public order in the face of the fact that there had been no prejudice to public order in the years during which the books had been in circulation, 'is in such outrageous defiance of logic that it falls squarely within the meaning of *Wednesbury* unreasonableness, and of irrationality.'

[22] Referring to the case of *Karam Singh v Menteri Hal Ehwal Dalam Negeri (Minister of Home Affairs), Malaysia* [1969] 2 MLJ 129, the Federal Court in the case of *Kerajaan Malaysia & Ors v Nasharuddin Nasir* [2003] MLJU 841; [2004] 1 CLJ 81 held as follows:

It seems apparent from these cases that where matters of national security and public order are involved, the court should not intervene by way of judicial review or be hesitant in doing so as these are matters especially within the preserve of the executive, involving as they invariably do, policy considerations and the like.

If however, the court found itself compelled to intervene, as it had done in the instant case, notwithstanding the ouster clause in s 8B or the cautionary advice I mentioned a moment ago, it must necessarily resolve the important question of whether the objective or the subjective test applies to the exercise of the Minister's discretion under s 8(1) of the ISA. In Malaysia, that question has been answered by the Federal Court in *Karam Singh*, consisting of a strong panel of eminent judges including Ong Hock Thy CJM and Suffian FCJ (as he then was) ...

Further at p 98 (CLJ) paras f–g, it was held that:

It is in the light of the principles enunciated in *Karam Singh* that the present case ought to be examined ... From this, it is immediately clear that the said report related to matters of national security which involved the respondent. The Minister was satisfied that the activities of the respondent threatened national security. That satisfaction was a subjective one. From that perspective, there would be no violation of the principles established in *Karam Singh*.

[23] In *Darma Suria bin Risman Saleh v Menteri Dalam Negeri, Malaysia & Ors* [2010] 3 MLJ 307, the Federal Court observed that the subjective satisfaction of the Minister on public order ground can be viewed objectively by the courts in the following terms:

A

> [5] ... it is insufficient if the Minister thought that he had reasonable grounds to be satisfied that the appellant had acted in a manner prejudicial to public order. The question that a court must ask itself is whether a reasonable Minister appraised of the material set out in the statement of facts would objectively be satisfied that the actions of the appellant were prejudicial to public order.

B

[24] In *Kumpulan Perangsang Selangor Bhd v Zaid bin Hj Mohd Noh* [1997] 1 MLJ 789, the court observed that:

C

> Of course, there may be cases in which — for reasons of public policy, national interest, public safety or national security — it may be wholly inappropriate for the courts to attempt any substitution of views. Unlike the executive, the judiciary is not armed with all the information relevant to such matters and one could well understand a High Court, in the exercise of its discretionary power, declining to enter into the merits of a decision involving these considerations. Each case must be considered on its own facts and it would be quite unwise to attempt the formulation of an all-embracing rule.

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[25] In the light of the principles cited above, it must be emphasised that the issue whether there must first be an actual occurrence of 'public disorder' before the respondent can make the impugned order as contended by the applicant in this instant application ought not to be made the true and correct test in determining the legality of the impugned order made by the respondent.

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[26] In my view the phrase 'prejudicial to public order' does not necessarily refer to the existence of an actual public disorder, but include anything which has the 'potential' to disrupt public order. This was clearly stated by the Federal Court in the case of *Darma Suria* as follows:

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> [12] In our judgment whether an act of smuggling is prejudicial to public order depends on the facts and circumstances of each case. If it disrupts or has the potential to disrupt the even tempo of the life of the community it would prejudice public order. It would also come within the scope of public order where it disrupts or has the potential to disrupt public safety and tranquility.

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[27] Reference should also be made to the Indian Supreme Court case of *SK Kedar v State of West Bengal* AIR 1972 SC 1647 where His Lordship Mathew J in delivering the judgment held:

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> The relevant criteria to distinguish in the abstract between acts prejudicial to maintenance of law and order and those which are prejudicial to maintenance of public order are laid down in a number of rulings of this court (see *Pushkar Mukherjee and Others v The State of West Bengal* (1), *Sudhir Kumar Saha v Commissioner of Police, Calcutta and another* (2) and *Nagendranath Mondal v The State of West Bengal* (3). The question whether a person has only committed a breach of law and order or has acted in a manner likely to cause a disturbance of the public order is one of degree and the extent of the reach of the act upon the society. An act

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by itself is not determinative of its own gravity. In its quality it may not differ from another but in its potentiality it may be very different. Similar acts in different contexts affect differently law and order on the one hand and public order on the other. It is always a question of degree of harm and its effect upon the community. Public order is the even tempo of the life of the community taking the country as a whole or even a specified locality. It is the degree of disturbance and its effect upon the life of the community in a locality which determines whether the disturbance amounts only to a breach of the law and order (see, *Arun Ghosh v State of Bengal* (4)).

In the final analysis, one must always return to the facts of the case to see whether the acts perpetrated are of such a nature or of such potentiality as to travel beyond the, immediate victims and affect the general or local public. A case by case adjudication gives the judicial process the impact of actuality and thereby saves it from the hazards of generalisation.

[28] Likewise in *Darma Suria*, it was observed by the Federal Court at p 313 that in determining whether an act may fall under public order or otherwise:

... The true test is not the kind, but the potentiality of the act in question...

[29] On the duty of the government to preserve public peace and order, in general it was observed by Raja Azlan Shah J (as HM then was) in *Public Prosecutor v Ooi Kee Saik & Ors* [1971] 2 MLJ 108 that:

The government has a right to preserve public peace and order, and therefore, has a good right to prohibit the propagation of opinions which have a seditious tendency ... Therefore, a meaningful understanding of the right to freedom of speech under the Constitution must be based on the realities of our contemporary society in Malaysia by striking a balance of the individual interest against the general security or the general morals, or the existing political and cultural institutions ... The dividing line between lawful criticism of government and sedition is this — if upon reading the impugned speech as a whole the court finds that it was intended to be a criticism of government policy or administration with a view to obtain its change or reform, the speech is safe. But if the court comes to the conclusion that the speech used naturally, clearly and indubitably, has the tendency of stirring up hatred, contempt or disaffection against the government, then it is caught within the ban of para (a) of s 3(1) of the Act ... To 'excite disaffection' in relation to a government refers to the implanting or arousing or stimulating in the minds of people a feeling of antagonism, enmity and disloyalty tending to make government insecure.

[30] At this juncture, it is important to note that the affidavit evidence shows that the respondent's grounds in making the order are essentially from the advice given by his officers, JAKIM and from his own appreciation of the contents of the publication.

[31] Lord Diplock in the case of *Bushell and another v Secretary of State for the Environment* [1980] 2 All ER 608 held that:

A No one could reasonable suggest that as part of the decision-making process after receipt of the report the minister ought not to consult with the officials of his department and obtain from them the best informed advice he can to enable him to form a balanced judgment ...

B **[32]** His Lordship further held at p 613, para c:

Discretion in making administrative decisions is conferred on the minister not as an individual but as a holder of an office in which he will have available to him in arriving at his decision the collective knowledge, experience and expertise of all those who serve the Crown in the department of which, for the time being, he is the political head. The collective knowledge, technical as well factual, of the civil servants in the department and their knowledge, technical as well as factual, of the civil servants in the department and their collective expertise are to be treated as the minister's own knowledge, his own expertise. It is they who in reality will have prepared the draft scheme for his approval; ...

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IRRELEVANT CONSIDERATION

[33] Learned counsel for the applicant contended that the Minister has E taken into account irrelevant consideration when he relied on the decision of the Jawatankuasa Fatwa. With respect, in my view there is no merit in the applicant's contention. The content of the publication relates to 'Islamic law matter' and therefore it would be reasonable for the Minister to place reliance on the decision of the Jawatankuasa Fatwa besides his own appreciation of the F contents of the publication as he has averred in his affidavit in reply.

[34] In my view, in order to prevent the publications from creating uneasiness, confusion, triggering restlessness among the muslims and causing disintegration, it is lawful for the respondent to act in the way he did to ban the G book under s 7(1) of Act 301 on the ground that the book is likely to be prejudicial to public order.

[35] I agreed with the submission of the applicant that the Minister must be H satisfied that s 7(1) of Act 301 requires that the prohibited publication falls within grounds set out in that provision. In this case, the grounds invoked by the Minister are that the four books are likely to be prejudicial to public order and security. Therefore, compliance by the Minister with s 7(1) of Act 301 in this case requires that the four books are likely to be prejudicial to public order I and security.

[36] The scope and extent of the s 7(1) of Act 301 was discussed in *Arumugam a/l Kalimuthu v Menteri Keselamatan Dalam Negeri & Ors* [2013] 5 MLJ 174 where the Court of Appeal at p 179 had held as follows:

> [10] The wordings in s 7(1), 'if the Minister is satisfied' and 'he may in his absolute discretion by order' are clear manifestations of the power being vested personally in the Minister and corollary to that vesting, any exercise of such power is to the subjective satisfaction of the Minister. Here the test for such satisfaction is subjective. It is without doubt a subjective discretionary power of the Minister.

Further at p 181, the Court of Appeal concluded in para 14 of its decision that:

> [14] It is our judgment that on the facts of the case the decision by the Deputy Minister to ban the book is neither so outrageous that defies logic nor against any accepted moral standards. The action taken by the Deputy Minister was one that is needed to be taken in the interest of national security (including public order) for which the executive bears the responsibility and alone has access to sources of information that quality it to decide what the necessary action is. And whether the decision is irrational or not, is a question of facts, to be decided by the judge. This is the rationale of Lord Diplock in Council of *Civil Service Unions and Others v Minister For The Civil Service* [1985] 1 AC 374, at p 410, which we followed.

[37] I also accept the submission of learned senior federal counsel that the respondent's decision in making the impugned order does not suffer from illegality since the reasoning offered in his affidavit were in fact based on public order grounds.

PROCEDURAL IMPROPRIETY

[38] The applicant submitted that he was not given reasonable opportunity to provide to the Minister the explanation that he has given in this judicial review proceeding.

[39] It is not disputed by the applicant that on or around 3 December 2013, the applicant received a letter from the Home Ministry dated 3 December 2013 informing that several books of the applicant's authorship had their prohibition certified by the JAKIM. The four books are mentioned in the title of the letter. As such, the Home Ministry invited the applicant to a meeting on 9 December 2013 to discuss the matter. The letter was also addressed to the Director General of JAKIM.

[40] However, by his letter dated 4 December 2013, the applicant relied to the Home Ministry's letter dated 3 December 2013 stating that JAKIM did not have any power under the law to prohibit any publication or book. In fact, the applicant averred on affidavit that the proposed meeting did not have any basis and was not necessary.

[41] Hence it is clear that the applicant was given the opportunity to be heard. He was called for a meeting to discuss on the prohibition of his four

books by JAKIM which he chose not to attend. Therefore, the applicant has no reason to complaint that he was not given the opportunity to be heard.

CONSTITUTIONAL ISSUES

[42] The applicant submitted that the works from three of the four books, namely 'Karbala', 'Ingin Jadi Nasrallah' and 'Tiga Kali Seminggu' had been published in other publications before being compiled as books. These works had been published in the *Dewan Sastera*, *Dewan Siswa*, *Dewan Budaya*, *E-Siswa* and *Nur* magazines and the *Utusan Melayu* and *Mingguan Malaysia* newspapers.

[43] Therefore, the applicant contended that he has the right to be treated equally under the law with the publishers of *Dewan Sastera*, *Dewan Siswa*, *Dewan Budaya*, *E-Siswa* and *Nur* magazines and the publishers of the *Utusan Melayu* and *Mingguan Malaysia* newspapers and that the applicant is entitled to the equal protection of the law. However, the applicant contended that the particular issues of *Dewan Sastera*, *Dewan Siswa*, *E-Siswa* and *Nur* magazines and the *Utusan Melayu* and *Mingguan Malaysia* newspapers have not been similarly prohibited under s 7(1) of Act 301 by the Minister.

[44] Therefore, learned counsel for the applicant submitted that the Minister's conduct in prohibiting 'Karbala', 'Ingin Jadi Nasrallah' and 'Tiga Kali Seminggu' but not the prior publications by DBP and in *Mingguan Malaysia* is discriminatory and therefore inconsistent with the requirements under art 8(1) of the Federal Constitution and that the Minister must act with fairness and equality of treatment. Hence, it was contended that the applicant's right under art 8(1) of the Federal Constitution has been infringed.

[45] In regards to the applicant's argument that the order is ultra vires, art 8 of the Constitution, in my view, the rights conferred under art 8 of the Constitution is not absolute. Under art 10(2)(a) of the Constitution, Parliament is empowered to restrict these rights through the provisions of the law. Article 10(2)(a) of the Constitution provides for:

> (2) Parliament may by law impose —
>
> (a) On the rights conferred by paragraph (a) of Clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, friendly relations with other countries, public order or morality ...

[46] The Printing Presses and Publications Act 1984 (Act 301) is one of the statutory provisions enacted pursuant to the provisions of art 10(2)(a) of the Federal Constitution which aims to limit freedom of expression of individuals

on the grounds, inter alia, prejudicial to public order as stated under s 7(1) of Act 301.

[47] The order is valid under Act 301 because the subject matter of the order is associated with 'publication' and the order was made in conformity with the object/purpose of Act 301. The definition of 'publication' is described in s 2 of Act 301:

> 'Publication' includes —
>
> (a) A document, newspaper, book and periodical;

The preamble to the Printing Presses and Publications Act 1984 (Act 301) provides as follows:

> An act to regulate the use of printing presses and the printing, importation, production, reproduction, publishing and distribution of publications and for matters connected therewith.

[48] Based on the above reasons, the applicant's right under art 8 of the Federal Constitution is not absolute. It must be stressed that the applicant is not estopped from producing academic or literary works and to promote literature and academic discussion provided it is done within the perimeters of the law.

CONCLUSION

[49] Based on the above reasons, in my view the respondent had exercised his discretionary powers under s 7(1) of Act 301 by not taking into account irrelevant considerations and took into account relevant considerations, without improper motives and has directed his mind in deciding to issue the order, and finally the decision was made in accordance with the objective of the statute.

[50] Based on the above reasons, the applicant's application is dismissed with costs of RM5,000.

Applicant's application dismissed with costs of RM5,000.

Reported by Dzulqarnain Ab Fatar